



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC NO.332 OF 2015

PAUL CAROLUS OFWONA.....PLAINTIFF

AND

MARGARET MUTHONI.....1ST DEFENDANT

JOSEPHAT NYANGE MWANGI.....2ND DEFENDANT

SUSAN WAWIRA MWANGI.....3RD DEFENDANT

LAND REGISTRAR MOMBASA.....4TH DEFENDANT

RULING

1. The application for determination is the Notice of Motion dated 5th July 2018 in which the 1st, 2nd and 3rd Defendants/Applicants are seeking the following orders:

1. That pending hearing and determination of this suit, the plaintiffs herein, PAUL CAROLUS OFWONA, be and is hereby ordered to demolish and remove the debris of the metal structure/garage which he constructed on MOMBASA/ZIWA LA NGOMBE SCHEME/1759 within 14 days of this order in default of which the 1st, 2nd and 3rd Defendants be at liberty to demolish the same

2. That cost of this application be paid by the plaintiff.

2. The application is based on the grounds on the face of the motion and supported by the affidavit of Susan Wawira Mwangi, the 3rd defendant sworn on 5th July 2018. Briefly, the applicants aver that the 2nd and 3rd defendants are the registered owners of the suit property known as **MOMBASA/ZIWA LA NGOMBE SCHEME/1759** while the plaintiff is the registered owner of the property known as **MOMBASA/ZIWA LA NGOMBE SCHEME/1760** which immediately adjoins the 2nd and 3rd defendants said property. That a survey of the joint boundary between the two parcels was conducted on 18th April 2018 pursuant to an order of this court and was found that the metal structure/garage belonging to the plaintiff has encroached on **PLOT NO.1759**. The applicant's aver that the said encroaching shed is blocking natural light from reaching the 1st -3rd defendants' house and is thus a nuisance. The applicants further contend that there are overgrown vegetation behind the structure which is posing a health hazard to the use, occupation and enjoyment of the applicant's house. That mosquitoes snakes, rats and other dangerous insects, rodents and animals have invaded the illegal structure and its surrounding and formed a permanent dwelling and breeding ground herein which has posed a great risk to their use, occupation and enjoyment of the 1st, 2nd and 3rd defendants to their house.

3. The applicants state that since the joint survey which was conducted pursuant to an order of the court and in the presence of the plaintiff himself has shown that the plaintiff's structure has encroached on the applicant's parcel of land, it is in the interest of justice that the structure be demolished forthwith to avoid subjecting the applicants to health risk and to enable them enjoy occupation and use of their house. It is the applicants contention that the said structure has become old, rusty, rickety and unfit for human habitation and use and is presently useless and can serve no purpose and that no party will suffer prejudice if the said structure is demolished.

4. The application is opposed by the plaintiff who filed a replying affidavit sworn by himself on 27th July 2018. He states that the application is an abuse of the court process and vexatious and that the applicants are simply delaying the hearing and determination of this suit. The plaintiff admits that the applicants own **PLOT NO.MOMBASA/ZIWA LA NGOMBE SCHEME/1759** while he owns **PLOT NO.1760**. the plaintiff states that the genesis of the matter currently pending determination before court is a boundary dispute in which he claims fraud was used to enable the applicants acquire a portions of his plot which he had leased to a tenant to construct a garage. He further states that the said garage has been on the said portion since the year 2007. The plaintiff avers that the court after hearing the plaintiff's application for injunction dated 11th December 2015 gave a ruling on 9th November, 2016 in which it noted that "since the portion is claimed by both parties

that the same be left unused/unoccupied until the suit is determined. That further it would be unfair in the circumstances to have one party benefit.”

5. It is the plaintiff’s contention that the applicants now want to indirectly review the said court’s ruling through the back door. The plaintiff avers that the said ruling has not been appealed against or reviewed hence the same is applicable until the suit is heard and determined. The plaintiff states that he disputes the outcome of the joint survey done on 18th April 2018 and has intimated to the applicants as much and requested a private surveyor to re-survey the plots. The plaintiff argues that the order for joint survey and its findings do not have the effect of altering the court’s earlier ruling and that granting the order for destruction of his tenants’ structure before the suit is heard and determined is tantamount to this court concluding the matter before the main suit is heard since the garage is the bone of contention and the boundary thereof. The plaintiff prays that the matter proceeds expeditiously as the court had directed for justice to be done for all parties herein and prayed that the application be dismissed with costs.

6. Both parties filed written submissions which I have read and I need not reproduce their contents herein.

7. I have considered the application, the affidavits in support and against and the rival submissions made and the authorities cited. It is not disputed that the plaintiff is the owner of **PLOT NO.MOMBASA/ZIWA LA NGOMBE SCHEME/1960** which borders the 2nd and 3rd defendants’ **PLOT NO.MOMBASA/ZIWA LA NGOMBE/1959**. It is also not disputed that the dispute revolves around a portion situate in the boundary of the two plots which the plaintiff had leased to a third party who constructed a garage thereon. The 1st, 2nd and 3rd defendats now seek a mandatory injunction to demolish and remove the said structure/garage. The applicants base their application on the finding of a joint survey conducted on 18th April 2018 pursuant to an order of this court. The report found that a welding shade labeled ‘A’ belonging to the owner of plot 1760 has encroached on plot 1759 by 4.0 m x 3.0 m.”

8. On his part, the plaintiff has opposed the application. The plaintiff pointed out that the court in its ruling given on 9th November 2016 noted that since the disputed portion is claimed by both parties, the same be left unused/unoccupied until the suit is heard and determined. The ruling has not been reviewed or set aside. Further, the plaintiff has stated that he does not agree with the findings of the joint survey and that granting the orders sought, would be tantamount this court concluding the matter at an interlocutory stage before the main trial.

9. The law as regards the principle to be applied when considering demotion is different from the principles set out in the case of **Giella –v- Cassman Brown & Co. Ltd (1973) EA 358** which deals with temporary injunctions. The standard of approach when considering whether or not to grant an interlocutory mandatory injunction is higher than that of a prohibitory injunction.

10. In the case of *Locabail International Finance Ltd. –v- Agro Export & Another (1986)1 ALL ER 901* it was stated:

“a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear case either where the court thought that the matter ought to be decided at once or where the injunction was at a simple and summary act which could easily be remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the court has to feel a high sense of assurance that at the end of the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than required for a prohibitory injunction. ”

11. The courts have been reluctant to grant mandatory injunctions at interlocutory stage. However, where it is prima facie established as per the standards spelt out in the law as stated above that the party against whom the mandatory injunction is sought is on the wrong, the courts have taken action to ensure justice is meted out without the need to wait for full hearing of the entire case.

12. In this case both the plaintiff and the applicants claim ownership of the disputed portion. The applicants have exhibited the findings of a joint survey report undertaken with the consent of both parties and pursuant to a court order. The plaintiff however states that he does not agree with the said findings. It is common ground that the court in its ruling dated 9th November 2016 held that the balance of convenience would be to let the portion remain unused/unoccupied until the suit is determined. The suit is not yet determined and that ruling has never been reviewed nor set aside. Moreover, the order of the court made on 7th December 2017 directed that the County Surveyor, Mombasa county to undertake a survey of the suit properties and to file a joint report. It never made any reference of the demolition or the ruling made on 9th November 2016.

13. Before this court, it has been established that the plaintiff or his tenant constructed the structure/garage in or about the year 2007. The survey report of course has found that the same has encroached on the 2nd and 3rd defendants plot. There is however a court order directing that the said structure/garage remains until the suit is determined.

14. Having carefully considered the material before me, I am not satisfied that a case for mandatory injunction has been made out. In my view, the demolition can still be undertaken in the event the applicants succeeds at last. The case is not unusually strong and clear as to allow me to grant the order for mandatory injunction as prayed for.

15. The upshot of this is that the notice of motion dated 5th July 2018 lacks merit and the same is hereby dismissed with costs

DATED, SIGNED and DELIVERED at MOMBASA this 11th day of February 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Oluga for Defendant/applicant

No appearance for plaintiff/respondent

Yumna Court Assistant

C.K. YANO

JUDGE

11/2/19